

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOSHUA L. FREY et al.,

Plaintiffs and Appellants,

v.

TRANS UNION CORPORATION,

Defendant and Respondent.

G031928

(Super. Ct. No. 798893)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Raymond J. Ikola, Judge. Reversed in part and affirmed in part. Remanded with directions. Request for judicial notice. Granted.

Friedemann O'Brien Goldberg & Zarian, John N. Zarian, David G. Bayles; Law Offices of Alan Himmelfarb, Alan Himmelfarb; Alexander Hawes & Audet and William M. Audet for Plaintiffs and Appellants.

O'Melveny & Myers, Phillip R. Kaplan, John H. Beisner, Brian P. Brooks, Amy J. Longo, Elizabeth C. Lemond; Piper Rudnick, Roger L. Longtin and Michael O'Neil for Defendant and Respondent.

INTRODUCTION

Joshua L. Frey appeals from an order denying his motion for class certification. He alleged claims against Trans Union Corporation under the unfair competition law, Business and Professions Code section 17200 et seq. (the UCL), violation of privacy rights, and unjust enrichment. (All further statutory references are to the Business and Professions Code unless otherwise specified.) Frey contends he and others provided confidential financial information to Trans Union who then unlawfully sold the information to third parties.

We first analyze the trial court's ruling with regard to the unfair competition claims. We apply Proposition 64 to this case and, as a result, we reverse the ruling on the unfair competition claims. Proposition 64 repealed the right under the UCL to bring a representative action without meeting the class certification requirements of section 382 of the Code of Civil Procedure. In ruling on the unfair competition claims, the trial court relied on a legal assumption that now is not correct—that Frey could pursue a representative action for unfair competition without satisfying class certification requirements. Because an order denying a motion for class certification will be reversed if the trial court made an erroneous legal assumption (*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-327 (*Sav-on*)), we reverse the trial court's order denying class certification of the unfair competition claims, and remand for further hearing with regard to those claims.

The trial court denied Frey's motion as to the privacy claims and the claim for unjust enrichment. In doing so, the court weighed the respective benefits and burdens of certifying the proposed class. In applying the standards set forth in *Sav-on, supra*, 34 Cal.4th 319 and *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429 (*Linder*), we conclude the trial court did not abuse its discretion. We therefore affirm as to those claims.

BACKGROUND

We refer only to those portions of the procedural history of this case that are relevant to the issues on appeal.

In December 2001, Frey filed a second amended complaint—the operative complaint—“on behalf of himself as an individual, as a private attorney general acting in the public interest under [the UCL], and as a class representative on behalf of all others similarly situated who reside in the State of California.” The second amended complaint alleged, *inter alia*, Trans Union (1) is one of the largest consumer credit reporting agencies in California and the United States; (2) collects detailed credit, financial, and other private and confidential information about consumers for the purpose of providing credit reports to its customers; (3) amasses target marketing lists through its “Master File” database (later referred to by the parties as the “List Master File”) which stores the collected private information; (4) “unlawfully misappropriated, disclosed, and sold” Frey’s and others’ “private financial, credit and other confidential information” to third parties for profit for at least eight years; and (5) violated the Fair Credit Reporting Act (FCRA), the California Consumer Credit Reporting Agencies Act (CCRAA), the UCL, and Frey’s and others’ constitutional rights to privacy.¹

The second amended complaint alleged the following five causes of action against Trans Union: (1) violation of the UCL; (2) declaratory relief as to violation of the UCL; (3) violation of the right to privacy; (4) declaratory relief as to violation of the right to privacy; and (5) unjust enrichment. (We refer to the first and second causes of action as the unfair competition claims, and the third and fourth causes of action as the privacy claims.)

In June 2002, Frey filed a motion seeking certification of the following class: “All California residents whose names and credit information were disclosed by

¹ The FCRA is codified at 15 United States Code section 1681 *et seq.*, and the CCRAA is codified at Civil Code section 1785.1 *et seq.*

Trans Union in the form of unauthorized consumer reports through the transfer or sale of, among other things, its List Master File to any unaffiliated third party, during the period from August 31, 1994 to March 1999.” Frey’s motion also requested certification of two additional groups as classes or subclasses; Frey’s additional request is not a subject of this appeal, and we therefore do not discuss it further. Trans Union opposed Frey’s motion. The trial court denied the motion.

Frey appealed.²

DISCUSSION

I.

STANDARDS FOR CLASS CERTIFICATION AND APPLICABLE STANDARD OF REVIEW

In *Sav-on, supra*, 34 Cal.4th 319, 326, the California Supreme Court reviewed “the established standards for class certification” as follows: “Code of Civil Procedure section 382 authorizes class actions ‘when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court’ The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. [Citation.] The ‘community of interest’ requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class

² Trans Union requested we take judicial notice of certain pleadings, filed in the United States District Court for the Northern District of Illinois, in the matter entitled *In re Trans Union Corp. Privacy Litigation* (N.D.Ill. 2002) 211 F.R.D. 328. One of the subject pleadings is a second amended consolidated complaint filed by 19 individual plaintiffs against Trans Union and an affiliate entity for willful and negligent noncompliance with the FCRA, invasion of privacy and misappropriation, unjust enrichment, and violation of the UCL. Frey did not oppose Trans Union’s request. We grant Trans Union’s request for judicial notice pursuant to Evidence Code section 452, subdivision (d).

representatives who can adequately represent the class. [Citation.] [¶] The certification question is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious.’ [Citation.] A trial court ruling on a certification motion determines ‘whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’”

We review the trial court’s denial of class certification for abuse of discretion. “‘Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. . . . [Accordingly,] a trial court ruling supported by substantial evidence generally will not be disturbed “unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]” [citation]. . . . “Any valid pertinent reason stated will be sufficient to uphold the order.”’” (*Sav-on, supra*, 34 Cal.4th at pp. 326-327.)

“As the focus in a certification dispute is on what type of questions—common or individual—are likely to arise in the action, rather than on the merits of the case [citations], in determining whether there is substantial evidence to support a trial court’s certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. [Citations.] ‘Reviewing courts consistently look to the allegations of the complaint and the declarations of attorneys representing the plaintiff class to resolve this question.’” (*Sav-on, supra*, 34 Cal.4th at p. 327.)

II.

THE UNFAIR COMPETITION CLAIMS

A.

The UCL and Proposition 64

The UCL prohibits unfair competition, including “any unlawful, unfair or fraudulent business act or practice.” (§ 17200.) Before Proposition 64 was approved by the voters on November 2, 2004, and became effective on November 3 (*United Investors Life Ins. Co. v. Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300, 1303), “[s]tanding to sue under the UCL [wa]s expansive Unfair competition actions c[ould] be brought by a public prosecutor or ‘by any person acting for the interests of itself, its members or the general public’” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143). Individuals were authorized under the UCL to maintain actions for unfair competition on behalf of the general public even though the litigation was not certified as a class action. (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126, fn. 10; see also *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1290, fn. 3.)

Proposition 64 amended the UCL by limiting standing to the Attorney General, certain local public prosecutors, and any person who “has suffered injury in fact and has lost money or property.” (§ 17204.)³ In addition, the UCL, as amended by

³ Section 17204, as amended, states: “Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association *or by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition.*” (Italics added.)

Proposition 64, authorizes only representative actions that meet the class certification requirements of Code of Civil Procedure section 382. Section 17203, as amended, states in part: “Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.”

In denying Frey’s motion for class certification, the trial court’s minute order stated, in part: “Assuming for purposes of discussion that a class could otherwise be certified in the case at bar, the court concludes that a weighing of the respective benefits and burdens counsels *against* certification of a class. No *substantial* benefit would accrue to class members that could not also be achieved in a representative action under [the UCL], and the burden on the court would be large.” The minute order further stated: “With respect to plaintiff’s claims under the UCL, Bus. & Prof. Code §§17200 et seq. (1st and 2nd causes of action), the court recognizes that in the event it is ultimately determined that Trans Union’s sale of certain segments of its List Master File was unlawful or unfair under the UCL, the failure to certify a class will preclude the disgorgement of profits into a fluid recovery fund. [Citation.] The court nevertheless concludes that the UCL claims should not proceed as a class action. The *substantial* benefit that can be achieved by this action can be achieved as well in a representative section 17200 action without the extremely burdensome overlay of a certified class.” The minute order also noted, “[i]n the case at bar, injunctive relief is plainly available in a representative UCL action, as is restitution to those persons found at trial to have lost an ‘interest in money or property . . . which may have been acquired by means of . . . unfair competition.’”

Proposition 64 no longer permits representative actions under the UCL that do not meet the criteria of class certification under Code of Civil Procedure section 382.

If Proposition 64 applies to this case, the trial court’s legal assumption that Frey could still pursue a representative action under the UCL, regardless of whether the action complies with class certification requirements, is now incorrect.⁴ We therefore turn to the question whether Proposition 64 applies to this case.

B.

The Repeal Doctrine

In *Governing Board v. Mann* (1977) 18 Cal.3d 819, 829 (*Mann*), the California Supreme Court stated, “Although the courts normally construe statutes to operate prospectively, the courts correlatively hold under the common law that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, ‘a repeal of such a statute without a saving clause will terminate all pending actions based thereon.’” The court held, “‘[i]f final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered.’” (*Id.* at p. 831; see Gov. Code, § 9606 [“Any statute may be repealed at any time, except when vested rights would be impaired”]; *Chapman v. Farr* (1982) 132 Cal.App.3d 1021, 1025 [“A statutory remedy does not vest until final judgment [A]nd an action remains pending until final determination on appeal”].)

⁴ The unfair competition claims in the second amended complaint did not include the allegations Frey sustained injury in fact and lost money or property. Thus, Frey may not be qualified as a proper class representative under the UCL, as amended by Proposition 64. However, in our review, “we must examine the trial court’s reasons for denying class certification” (*Linder, supra*, 23 Cal.4th 429, 436), which did not include the determination that Frey was not a proper class representative. We also do not consider the legal or factual merit of the action in our review. (*Sav-on, supra*, 34 Cal.4th at p. 326 [“The certification question is ‘essentially a procedural one that does not ask whether an action is legally or factually meritorious’”].) We therefore do not further address the standing issue posed by application of Proposition 64 to this case.

In *Mann, supra*, 18 Cal.3d at page 821, a school district successfully sought a “judicial determination” that a teacher’s marijuana conviction constituted sufficient grounds for dismissal under former Education Code section 13403, subdivision (h). Former Education Code section 13403, subdivision (h) provided that “[conviction] of a felony or of any crime involving moral turpitude’ constitutes cause for dismissal of a permanent teacher.” (*Mann*, at pp. 821-822.) During the pendency of the appeal, the Legislature enacted a new Health and Safety Code provision precluding any public entity (including a school district) “from revoking any right of an individual on the basis of a pre-1976 possession of marijuana conviction so long as two years have elapsed from the date of conviction.” (*Id.* at p. 822.)

The California Supreme Court held the new Health and Safety Code provision constituted a repeal of the provision in the Education Code notwithstanding the absence of express language in the legislation saying so. The California Supreme Court stated, “Although the new enactment does not specifically refer to [former Education Code] section 13403, subdivision (h), and although repeals by implication are not favored [citation], when, as here, a subsequently enacted specific statute directly conflicts with an earlier, more general provision, it is settled that the subsequent legislation effects a limited repeal of the former statute to the extent that the two are irreconcilable.” (*Mann, supra*, 18 Cal.3d at p. 828.)

In *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109 (*Younger*), the California Supreme Court reiterated the “well settled rule” that “an action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final.” The court explained, ““[t]he justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time.”” (*Ibid.*)

C.

Proposition 64 Repealed Rights “Wholly Dependent on Statute” and Without a Saving Clause.

As discussed above, the UCL has been amended by Proposition 64 to limit (1) representative actions only to those cases that satisfy the class certification requirements under Code of Civil Procedure section 382, and (2) standing exclusively to those persons (other than the Attorney General and certain local public prosecutors) who have sustained injury in fact and lost money or property as a result of such unfair competition. As in *Mann, supra*, 18 Cal.3d at page 828, Proposition 64 directly conflicts with the earlier, more general and broader standing and representative action requirements of the UCL before it was amended. Therefore, Proposition 64 “effects a limited repeal of the former statute.” (*Mann*, at p. 828.)

The repeal doctrine still applies even though the electorate documents used the word “amends” as opposed to the word “repeals” in describing Proposition 64’s impact on the UCL. (See *Younger, supra*, 21 Cal.3d 102, 109 [“Although cast in terms of an ‘amendment’ to [Health and Safety Code] section 11361.5 (S.B. 95), the new legislation completely eliminates the earlier procedure for records destruction by order of the court,” and the repeal doctrine applies].) In addition, although Proposition 64 only partially amended the UCL, partial amendment of a statutory right does not preclude application of the repeal doctrine. (See *Benson v. Kwikset Corp.* (2005) 126 Cal.App.4th 887, 904 [“The mere fact Proposition 64 amends only portions of the unfair competition law . . . does not preclude application of the repeal principle”]; see also *Younger, supra*, 21 Cal.3d at pp. 109-110.)

The pre-Proposition 64 right under the UCL to bring representative actions absent injury in fact and regardless of whether class certification requirements were satisfied was “wholly dependent on statute.” (*Younger, supra*, 21 Cal.3d at p. 109.) Citing *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, the appellate court in

Branick v. Downey Savings and Loan Assn. (2005) 126 Cal.App.4th 828, 843 held the UCL, before it was amended by Proposition 64, “granted to persons who did not suffer competitive injury the right to bring representative actions on behalf of the general public—a right that did not exist under the common law.” In *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th 1254, 1263-1264, the California Supreme Court stated, “The common law tort of unfair competition is generally thought to be synonymous with the act of ‘passing off’ one’s goods as those of another. The tort developed as an equitable remedy against the wrongful exploitation of trade names and common law trademarks that were not otherwise entitled to legal protection. [Citation.] . . . ¶ . . . ¶ . . . In contrast, *statutory* ‘unfair competition’ extends to all unfair and deceptive business practices. For this reason, the statutory definition of ‘unfair competition’ ‘cannot be equated with the common law definition.’” (Italics added.)

When legislation repeals a right wholly dependent on statute, the California Supreme Court in *Younger*, *supra*, 21 Cal.3d at page 110, explained, “[t]he *only legislative intent relevant* in such circumstances would be a determination to save this proceeding from the ordinary effect of repeal illustrated by such cases as *Mann*[, *supra*, 18 Cal.3d 819].” (Italics added.) In *Younger*, the Supreme Court found the legislation at issue “contain[ed] no express saving clause, and none [wa]s implied by contemporaneous legislation.” (*Ibid.*)

Proposition 64 does not contain a saving clause indicating an electorate intent to save pre-Proposition 64 UCL actions from the ordinary effect of repeal. (See *Mann*, *supra*, 18 Cal.3d at p. 829 [“‘a repeal of such a statute without a saving clause will terminate all pending actions based thereon’”].) In light of the foregoing analysis, we join those cases holding Proposition 64 applies to pending cases. (See *Benson v. Kwikset Corp.*, *supra*, 126 Cal.App.4th at pp. 897-898 [holding amendments to the UCL enacted by approval of Proposition 64 applied to pending action on appeal]; *Lytwyn v. Fry’s Electronics, Inc.* (2005) 126 Cal.App.4th 1455, __ [2005 Cal.App. Lexis 267, *48-*49]

[same]; *Branick v. Downey Savings and Loan Assn.*, *supra*, 126 Cal.App.4th at p. 844 [holding Proposition 64 partially repealed the UCL within the meaning of Government Code section 9606 and therefore applied to the case pending on appeal]; *Bivens v. Corel Corp.* (2005) 126 Cal.App.4th 1392, __ [2005 Cal.App. Lexis 256, *16] [“Without a savings clause, Prop. 64’s repeal of unaffected plaintiffs’ statutory authorization to pursue UCL claims is effective immediately”].)

In *Californians for Disability Rights v. Mervyn’s* (2005) 126 Cal.App.4th 386, 395-396, the appellate court, relying on *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, held Proposition 64 did not apply to preexisting lawsuits because “Proposition 64 does not show an unmistakable intent that its statutory amendments apply retroactively.” The Court of Appeal’s reliance on *Evangelatos* is misplaced because *Evangelatos* involved the statutory repeal of a common law right, not a statutory right. *Evangelatos*, therefore, did not discuss the repeal doctrine, or cite or analyze either *Mann*, *supra*, 18 Cal.3d 819 or *Younger*, *supra*, 21 Cal.3d 102.

D.

We Reverse the Trial Court’s Order Denying Class Certification as to the Unfair Competition Claims, and Remand for Rehearing on the Class Certification Motion.

Because we conclude Proposition 64 applies to this case by operation of the repeal doctrine, the trial court relied on a legal assumption that is no longer correct—that Frey might pursue the unfair competition claims on a representative basis without meeting the class certification requirements of Code of Civil Procedure section 382. The trial court denied class certification of the unfair competition claims in light of the remedies available in representative actions and after concluding “a class action is not a superior means by which to address the alleged conduct.” The court, however, did not decide whether a class could otherwise be certified in this case. We therefore remand the matter to the trial court to hold a further hearing on Frey’s motion for class certification

as to the unfair competition claims. We do not express any opinion on the merits of Frey's motion, and our holding is without prejudice to Trans Union's ability to file a dispositive motion challenging the merits of the second amended complaint in light of Proposition 64's impact on this case.

III.

THE PRIVACY CLAIMS AND THE UNJUST ENRICHMENT CLAIM

Frey argues the trial court abused its discretion by denying his motion for class certification as to the privacy claims and unjust enrichment claim because the court erroneously concluded (1) "neither nominal nor punitive damages would confer a substantial benefit on individual class members"; (2) neither damages on the privacy claims nor unjust enrichment could be calculated on a classwide basis; and (3) "[i]ssues of liability for invasion of privacy also would require individualized inquiry." We address each of Frey's arguments in turn.

A.

The Trial Court Properly Considered the Amount of Nominal Damages Potentially Recoverable, Among Other Factors, in Concluding Such Damages Would Not Confer a Substantial Benefit on Individual Class Members.

In the context of the privacy claims and in response to Frey's argument that "nominal damages and punitive damages should be made available on a class-wide basis without individualized inquiry," the trial court stated, "[t]he term 'nominal damages' describes two types of award—a trifling or token allowance for mere technical invasion of a right, without actual damage; and the very different allowance made when actual damages are substantial, but their extent and amount are difficult of precise proof." [Citation.] With respect to the first type of award, 'a trifling or token allowance for mere technical invasion of a right, without actual damage,' such an award would hardly confer a substantial benefit on individual class members."

Frey contends the trial court erroneously concluded that the first type of nominal damages, described in the order as a “trifling or token allowance,” would not “confer a substantial benefit on individual class members.” He contends the trial court’s conclusion “ran afoul of the policy articulated in *Blue Chip Stamps* [(1976) 18 Cal.3d 381], which was that the court should *not* adopt a judicial policy that would permit a company to retain the benefits of its wrongful conduct because it exacted ‘a dollar from each of millions of customers.’” (First italics added, second italics in original.)

The California Supreme Court in *Blue Chip Stamps v. Superior Court*, *supra*, 18 Cal.3d 381, 385 directed the trial court to vacate its order certifying a class action after considering, among other things, the minimal amounts due to each purported class member in compensatory damages. Justice Tobriner in a separate concurring opinion stated, “[t]he problems which arise in the management of a class action involving numerous small claims do not justify a judicial policy that would permit the defendant to retain the benefits of its wrongful conduct and to continue that conduct with impunity.” (*Id.* at p. 387.) In *Linder*, *supra*, 23 Cal.4th 429, 445-446, the California Supreme Court observed that Justice Tobriner’s separate opinion in *Blue Chip Stamps v. Superior Court* “effectively clarified that trial courts remain under the obligation to consider ‘the role of the class action in deterring and redressing wrongdoing.’” The Supreme Court explained, “[t]he benefits and burdens of a proposed class action must be evaluated under correct legal standards. While the potential amount of each individual recovery is a significant factor in weighing the benefits of a class action, it is not the only factor requiring consideration.” (*Linder*, *supra*, 23 Cal.4th 429, 446.)

Thus, the California Supreme Court’s decisions in *Blue Chip Stamps v. Superior Court*, *supra*, 18 Cal.3d 381 and *Linder*, *supra*, 23 Cal.4th 429 establish that a trial court should consider the potential amount of recovery available to class members in determining whether to grant a motion seeking class certification. *Linder* and Justice Tobriner’s separate opinion in *Blue Chip Stamps* caution, however, that the potential

amount of recovery must not be the only factor considered before denying a motion for class certification. By suggesting the trial court here denied class certification solely on the ground each class member would only obtain nominal damages insufficient to confer a substantial benefit, we believe Frey has taken the trial court's statements out of context.

A reading of the entire minute order shows the trial court considered several factors, including the size of the proposed class. The court noted, "it is easily seen that this class definition will potentially include nearly every gainfully employed adult in the State, and many minors as well. . . . [T]he size of this 'limited' state-wide class may be in the range of 25 million." Frey does not challenge the trial court's estimation of the potential size of the proposed class. As further discussed below, the court also considered the degree to which issues of liability and damages would entail an individualized inquiry and the manageability of the case as a class action. (See *Sav-on*, *supra*, 34 Cal.4th at p. 334.) In view of the court's weighing of those factors, its explanation and its analysis, the trial court did not abuse its discretion by considering the potentially recoverable amount of nominal damages in denying class certification of the privacy claims.

B.

*The Trial Court Did Not Err by Concluding the
Determination of Damages on the Privacy Claims and the
Amount of Unjust Enrichment Would Overwhelm the Court
with Individual Inquiries.*

Frey contends the trial court "erroneously denied class certification on the ground that neither damages nor unjust enrichment could be calculated on a class-wide basis." In the order, the trial court stated, "With respect to the 'privacy claims' (the 3rd, 4th and 5th causes of action), plaintiff has not been able to demonstrate any means by which damages for invasion of privacy (3rd cause of action) could be calculated on a class-wide basis, or how the amount by which defendant has been unjustly enriched at the expense of each class member would be measured (5th cause of action). This inability

suggests that an award of monetary damages or an award of unjust enrichment would overwhelm the court with individual inquiries as to each class member's damage. This issue alone compels the conclusion that, although common issues of fact are indeed present, the common issues of fact do not predominate as to the 3rd and 5th causes of action.”⁵

The California Supreme Court in *Sav-on, supra*, 34 Cal.4th at page 326, stated, “The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members,” which includes a showing of “predominant common questions of law or fact.” In *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108, the Supreme Court held, “Plaintiffs’ burden on moving for class certification, however, is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate*.” The court further explained that whether common issues predominate ““means “each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants.””” (*Ibid.*)

Frey did not show in his motion for class certification how damages under the privacy claims and an award for unjust enrichment would be calculated on a classwide basis; in the appellants’ opening brief, Frey does not address this failure. In a

⁵ With regard to a classwide award of punitive damages, the trial court further stated, “the law requires proof of *actual* damages before an award of punitive damages is permitted. Although an award of nominal damages will support an award of punitive damages, the nominal damages in such a case must be of the type that reflect the difficulty of determining the amount of damage where the existence of actual damage has in fact been demonstrated. [Citation.] To show something beyond a technical invasion of a right, i.e., to demonstrate the existence of *actual* damage, would require an individualized inquiry.”

supplemental brief, without citing to the record and without elaboration, Frey states, “in the trial court, [Frey] suggested various procedural tools for ascertaining the measure of disgorgement and/or damages in this case, including (i) calculations based upon the profits made by Trans Union, (ii) statistical averages and approximations, (iii) valuation of the consumer data at rates charged by Trans Union on the open market, and/or (iv) a nominal damages assessment for the unlawful use of consumer data.” But Frey fails to show, even in his supplemental brief, how those suggestions would reduce the number of individual inquiries necessary to calculate damages for violation of privacy rights or an award for unjust enrichment. The trial court did not abuse its discretion by determining Frey failed to carry his burden of showing that common issues predominate.

In the opening brief, Frey argues, “[u]nder California law, however, individual issues regarding damages should not preclude the certification of a class. [Citation.] Ultimately, the trial court’s denial of class certification runs squarely afoul of this maxim.” In *Sav-on, supra*, 34 Cal.4th 319, in which the Supreme Court affirmed the trial court’s order certifying a class of 600 to 1,400 members (*id.* at p. 326), the court stated, “We long ago recognized ‘that each class member might be required ultimately to justify an individual claim does not necessarily preclude maintenance of a class action.’ [Citation.] Predominance is a comparative concept, and ‘the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.’ [Citations.] *Individual issues do not render class certification inappropriate so long as such issues may effectively be managed*” (*id.* at p. 334, italics added).

Here, the minute order does not show the trial court denied class certification simply because the determination of damages would involve individual issues. Instead, the trial court determined calculation of damages with regard to the privacy claims and an award for unjust enrichment for 25 million potential class members would overwhelm the court with individual inquiries—and thus be unmanageable as a

class action. In so doing, the trial court did not rely on any improper criteria or make any erroneous legal assumptions. (See *Sav-on, supra*, 34 Cal.4th at pp. 326-327.)

Frey argues the trial court was required to consider several factors in determining whether to deny class certification and thus erred by relying only on the determination the court would be overwhelmed with individual inquiries in calculating damages. As discussed above, the minute order shows the trial court took into account several factors in denying class certification of the privacy claims and the unjust enrichment claim, including the proposed size of the class, Frey's failure to show how damages or any other award would be calculated, and as further discussed below, the extent to which liability issues under the privacy claims would also require individualized inquiry.

The trial court did not abuse its discretion by concluding common questions of fact do not predominate and the presence of extensive and substantial individual questions do not make class action advantageous in this case.

C.

*The Trial Court Did Not Err by Concluding Common Issues
Do Not Predominate in the Determination of Liability Under
the Privacy Claims and Unjust Enrichment Claim.*

Frey contends the trial court erred by denying the motion for class certification on the ground the "issues of liability would require individualized inquiry" with regard to the unfair competition claims, the privacy claims and unjust enrichment claim. The trial court, however, did not state that issues related to the determination of Trans Union's liability under the unfair competition claims or unjust enrichment claim would require individualized inquiry.

The trial court's order does express concern that the determination of Trans Union's liability under the *privacy* claims would require individualized inquiries to such an extent that common issues would not predominate. The elements of a claim for

invasion of privacy in violation of the state constitutional right to privacy are “(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.” (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40.)

The trial court stated in the minute order, “As noted in *Hill v. National Collegiate Athletic Assn.*[, *supra*,] 7 Cal.4th 1, 36-37: ‘Even when a legally cognizable privacy interest is present, other factors may affect a person’s reasonable expectation of privacy. For example, advance notice of an impending action may serve to “limit [an] intrusion upon personal dignity and security” that would otherwise be regarded as serious. . . . [T]he presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant.’ [¶] So too in the case at bar. The evidence establishes that individuals were permitted to ‘opt-out’ of the List Master File. Some may have known of this opportunity—some may not have known. Some of those who knew of the right exercised it—others waived it—or simply didn’t feel that their privacy was being invaded. Those truisms compel the conclusion that, at least with respect to the constitutional privacy claims and the claim for unjust enrichment, 3rd, 4th, and 5th causes . . . of action, common issues do not predominate. [¶] Finally, as to the privacy claims, and with respect to the [Federal Trade Commission] findings that target marketing lists were a ‘consumer report’ and that their transfer or sale for purposes not authorized by FCRA must be enjoined, those findings are simply *not* coextensive with a finding that the sale of target marketing lists violates any individual plaintiff’s constitutional right of privacy.”

Frey challenges the minute order’s reasoning by arguing: “The invasion of these privacy interests is common to all members of the proposed Class, in the form of Trans Union’s dissemination of confidential data through the List Master File. Under these circumstances, individualized proof of each privacy element should *not* be required to establish liability.” (Fn. omitted.) Frey’s argument, however, does not respond to the

trial court's point that if a member of the purported class had knowingly waived the opportunity to opt out of the List Master File, an issue would have arisen whether Trans Union's conduct of selling that member's private confidential information to a third party constituted a serious invasion of that member's privacy. Frey does not dispute substantial evidence supported the trial court's finding that purported class members were permitted to "opt-out" of the List Master File. Thus, the trial court properly considered the extent to which an individual inquiry would be required to determine liability issues on the privacy claims in deciding Frey's motion and the manageability of the case as a class action. The trial court did not rely on improper criteria or erroneous legal assumptions, or otherwise err in denying Frey's motion for class certification. We therefore find no abuse of discretion.

DISPOSITION

The order denying certification of a class action is reversed as to the unfair competition claims only. With respect to the unfair competition claims, we remand to the trial court for a further hearing on Frey's motion for class certification. The order denying certification of a class action is otherwise affirmed. In the interests of justice, both parties shall bear their own costs on appeal.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.